

HAKES (HARRY)

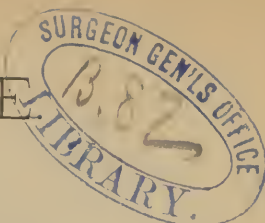
Malpractice





# MALPRACTICE

BY DR. HARRY HAKES.



At a stated meeting of the Luzerne County Medical Society, held July 10th, 1878, the following resolutions were adopted:

*Resolved*, That the subject of "Malpractice" be chosen for discussion at the annual meeting in January, 1879, and that Drs. J. B. Crawford and Harry Hakes be appointed to open the same.

*Resolved*, That Dr. Hakes be requested to invite members of the legal profession to be present and take part in the discussion.

In pursuance of the above resolutions, Dr. Harry Hakes, of the Luzerne Bar, prepared and read the following address:

*Mr. President and Gentlemen:—*

The term malpractice, as nomen generalissimum, applies equally to all bad or evil practice, unskilled or unscientific labor in any or every human undertaking requiring care and skill. By common consent and usage it is, however, very much restricted—in fact it has come to be used simply to designate want of professional skill in the practice of medicine and surgery. Even more, it is confined, practically, to the department of surgery, and mostly to only that part of surgery which is directed to the treatment of osseous fracture and dislocation. There appears no very good reason why the same term should not signify and express a want of a certain standard of professional skill and qualification in the practice of the learned profession of the law. However, the same general purpose is effected in that profession by the terms, "pettifogger," "unprofessional conduct," "ignorance," "carelessness," "mistake," and in a criminal sense, "fraud." In the other learned profession, theology, we hear nothing of malpractice. "Bigotry," "superstition," "ignorance," "heresy," "imposition," "falsehood," and even "fraud," are terms used pretty freely. But suits at law, for damages, are unknown to either correct or condemn, or to repair damages in money. Perhaps the greater reason for the exemption of the professions of law and theology from the opprobrious epithet, *malpractice*, is because the common people cannot, or do not, so easily perceive what defects in those professions amount to malpractice. One other reason, undoubtedly, is that malpractice in law or theology is not as serious or grievous in its consequences as malpractice in medicine and surgery. Still another reason in regard to theology is that in that peculiar profession there is not, and perhaps cannot be, any general or universal standard of excellence, skill or proficiency, to which its members would acknowledge allegiance. Malpractice in the practice of the law may be very disastrous in its consequences to a client, but in civil practice, with a very few exceptions, it can be measured very exactly in dollars and cents; but in proceedings, in their nature *de lunatico*, may involve restraint of liberty, and in criminal practice, not only liberty, but may extend to life, the dearest of all earthly possessions.

Not so, however, in theology. Whether my spiritual adviser teach me the knowledge of one God or twenty, that the fuel of Hell

is sulphur or anthracite, petroleum or hemlock, the business of angels singing or fighting, deprives me of neither life or personal liberty, of real or personal property, or estate. In any case the proofs of loss or damage, like the fact of error, mistake, or falsehood, can only be ascertained after it is too late for human courts of justice to obtain jurisdiction.

How very different stands the case in medicine and surgery. In many cases the decision between living and dying depends absolutely upon the knowledge, promptitude and skill of the practitioner. Not alone this much, but in every case it is largely true. Take the simplest possible case to which a physician may be called, where, to a very fine certainty, life is not endangered. Suppose by mistake the doctor gives a tablespoonful of arsenous acid or corrosive sublimate when he intended to give as much magnesia carbonate. If the poisonous drug was intentionally administered, it takes the case out of the range of a case of malpractice, and it ranks as the highest of crimes. With such a case this paper has nothing to do. But if it is simply a mistake, it is a case of malpractice, and as such is liable to be compensated in damages. If the practitioner did not know the dangerous character of the drug, it would be malpractice from ignorance, or if he did not know or could not distinguish the magnesia from the arsenic, the same results follow. The practical results which necessarily follow from wrong diagnosis are too numerous (and to educated men) too apparent to here require examples. Yet, unquestionably, the large, very large, majority of cases of pure malpractice occur in the medical department of the profession. If this proposition is correct the question will be asked, "Why then is medical malpractice so rarely the subject of judicial investigation, while from time to time there is quite a harvest of surgical malpractice cases?" The answer is as simple as it is shameful. It is common, general, universal, unpardonable ignorance in regard to human anatomy and physiology, and in fact of every element that constitutes the only true foundation for the reasonable practice of medicine and surgery. This ignorance is by no means confined to the unlettered. It pervades all classes of society. The ermine of the judicial bench or the gowns of the pulpit can neither cover or conceal it. The members of the bar, of all men, are least excusable for the very profound indifference with which they regard this important branch of knowledge, the want of which they share with the commonest ignoramus. The banker with his gold, the merchant with his goods, the millionaire with his wealth, the laborer in his blouse, and the beggar in his rags, in this respect occupy about the same plane. Men will dig the whole earth and dredge the depths of the sea for a crystal of gold or a worthless pebble. They will travel the whole earth to gaze upon old stone buildings or view, in the museums of art treasure, a picture or statue resembling

ling a man or woman in a state of nudity, by one of the old masters. Yes, they will talk by the hour, in affected ecstasies, of the things they have seen abroad. How many of all these classes of people ever opened the book of their own bodies? Made and stamped in the image and likeness of God, the quintessence and perfection of creative power, containing the wonderful machinery of the senses and the capacity to know and commune with the invisible Deity, and yet cannot identify the various organs of their own structure, or state their various purposes or uses, or designate the lungs from the liver, the kidneys from the spleen, the stomach from the bladder, the thoracic duct from the aorta, brain from fat, artery from vein, or the par vagum from a shoestring. Now, to extend the argument to another degree, we must add to this general ignorance yet something more. It may be easily surmised that those who are profoundly ignorant and indifferent as to the general structure of their own bodies, and their physiology and the pathology of disease, will, to a similar extent, be ignorant and indifferent with respect to the nature, appearance and uses of the various medicinal agents or drugs that may be used for the prophylactic or curative treatment of disease, and diseased or disordered action; who, in an indifferent way, regard the mysterious or occult powers and properties of drugs, or their combinations in the cure of disease, and to whom aquafortis and assafoetida, chloroform and paragon, ipecac and jalap, creosote and cod liver oil, cow dung poultice and skunk's grease, rattlesnake's oil and pain killer, electricity and the laying on of hands, have about the same meaning and the same supposed utility. In medicines and medical treatment, then, the charlatan impostor and quack find their forte and paradise, their protection and their profit. In this field they can compete with the best educated medical men the schools can produce. Their patented compounds, resembling the witches stew in the play of Macbeth, have a fascinating charm among all classes of society. Through the length and breadth of the globe the mysterious and wonderful powers of the witch doctor, the fortune-teller, and lastly, the second sight and spiritualistic medium hawk their wares and profitable trade, and high and low alike pay their tribute in patronage, adoration and cash. Educated medical men can but contemptuously protest and grudgingly excuse the weakness of a brother who, seeing the decidedly popular taste, abandons the high standard of his calling, mixes his secret compound for the cure of all diseases, and, throwing his manhood and profession to the dogs, rushes in the market to pander to, and fatten upon, the credulity of his customers. The profession itself, it is proper to state, recognizes a standard of professional qualification covering more honorable and extensive fields than is known to the laity. To appreciate, to its full extent, the popular judgment passed upon the profession, and the peculiar manner in which it is estimated, it becomes necessary to show how such a judgment became possible, and how the crude opinions, so pertinacious and inveterately fixed in their character, had their origin. The history of the medical art, fortunately, furnishes the full text, and the briefest outline of the same must here suffice,

and from the data furnished, the commonest mind can put in the filling, and the commonest experience fortify the argument.

The profession of medicine had its parentage in the humblest beginnings, unmarked by a single attribute of philosophy, knowledge, common sense, or reasonable nonsense. Astrology, divination, necromancy, sorcery, witchcraft, miracle, magic, and even legerdemain—each furnished full quotas to make the sum total of the infant art. Down to the time of Hippocrates, it had never been dreamed that the healing art was anything but a supernatural gift to those who devoted themselves to its practice. That ancient philosopher, the acknowledged father of the art, first laid down some of the laws or rules that must forever be ground work upon which to erect a reasonable theory and practice of medicine. He had the boldness, as well as the wisdom, to deny that disease and death were caused by the workings of evil spirits, or to be cured or prevented by the jugglery of the wizard or the imprecations of priestcraft. We do not certainly know that he ever dissected the human body minutely; but it is impossible to evade the conclusion, from his description (very crude indeed) of the more important organs and viscera, that at least in a general way he had investigated the same. With a very limited following to hand down through succeeding generations the data and dicta of the founder, we find but meagre improvement until the days of Aristotle. That illustrious philosopher not only planted the true foundations upon which now stands all rational natural and physical science, but also, with the same wonderful sagacity, established a school of scientific medicine—the ground work, a knowledge of anatomy and physiology, the practice to be governed by legitimate theory and the results of experiment, demonstration, experience and accurately observed facts. Through his influence Ptolemy Sotor founded the medical department of the great Alexandrian school. Here it was, 300 years before the Christian era, that Erasistratus and Herophilus, under Ptolemy Philadelphus, dissected not only the dead human subject, but sometimes those who were by no means dead. The dismantling of that famous school, which gave promise of shedding its illuminating rays upon the whole world, was followed by a long age of darkness, during which religious wars, ignorance, bigotry and superstition were the ruling forces; the study of the natural or physical sciences was interdicted, and priestcraft was so engaged with the souls of men, and getting them to either heaven or hell, that their physical welfare or improvement seemed of no account. At length Galen discovers a portion of the long lost art, and such was the interest he excited and the impetus he gave it, that from his day to the present all civilized nations have founded schools for the education of men for the medical profession.

And now that it ought to be as well known that the physician's art is acquired, and can only be successfully practiced by following a course of study and rules established by observation and experience, in the same manner as all artisans, each in their vocation, is it not strange that people so generally look for the signs and ancient ear-marks that pertained to the conjuration of the ancient medicine man in the practice of his black and



secret art! The popularity of recent patent compounds and concoctions, with names indicating occult and mysterious powers and properties, too plainly and painfully reminds medical men that for ages yet to come and go the popular idea of medical practice is thoroughly associated with the mysteries of magic, divination and the working of miracles. "Magic oil," "wizard oil," "magnetic ointment," "pain killer," "ready relief," "lightning salve," "magnetic rings," "velocipede pills, through by daylight," "mediumistic treatment," "instant cure," &c., &c., are names that reap a rich harvest of cash, leaving their purchasers, just as before, ready to be relieved by some other magic nostrum.

At common law a physician could not maintain a suit for his services. His compensation was a gratuity, its amount governed only by the liberality of his patient. As his power to cure or mitigate disease was not believed to be the result of study, labor, or acquired skill, but intuitive, occult, mysterious by association with gods, devils and familiar spirits, of course no human judgment could appreciate its virtue, or estimate its value. We might reasonably suspect, even in the absence of historic data, that in ancient times, as yet among savage and unlettered nations, the post or profession was monopolized by the priests. Operative surgery was a profession distinct from medicine and had its origin among the barbers. That it was rude, bordering on savagery, is unquestionable. Not to rehearse the manner of operation, an inspection of the early surgical instruments or barber tools collected and preserved in the Dupuytren museum of Paris, or the Hunterian museum of the Royal College of Surgeons of London, gives some idea of the horrid grandeur of ancient barber operative surgery.

By the crude, undefined and mysterious standards by which medical and surgical practice in their infancy were regarded, estimated and judged, they are yet judged; and the laity, as well as the courts, seldom, if ever, attempt a judgment except in those cases where an ankylosed articulation or deformed position of osseous union or non-union of fractured parts are plainly observable on inspection. Yet in these very cases, the common or uneducated judgment as to the individual merits of each particular case is of little more value than in those medical cases where judgment is never attempted and the grave generously covers every evidence of mistake or error.

Gentlemen of the medical profession may complain as loudly as they please, still they must realize the peculiar position they occupy in courts when charged with malpractice, and understand why it is thus. When your judges, juries, and I must add lawyers, shall take the same interest in knowing the construction of their own bodies, and the uses of their various parts, as they do of a buck board or an old boot, a clock or a locomotive, then you will begin to stand an even chance in court with your fellow citizens. It must not be understood that well educated practitioners are afraid of scrutiny; for they are as much benefited as any class, and more so, by the expose of quackery and malpractice. What they do complain about is this, that while they are held to account for professional skill and professional conduct, they complain that

in the vast majority of cases of suits against them for malpractice the members of the bar violate those rules of etiquette, good faith and fair dealing prescribed by the recognized authorities in their great calling or profession.\* They charge, and can prove, that in a large majority of such cases the suit is instituted and conducted without a retainer; nay, at the expense of the lawyer—not as matter of charity, but (without openly declaring the fact to either court or jury) the attorney has a secret partnership with his client, in fact is pleading his own case in a speculation that dared not risk a retainer. Not only is this the case, but it will nearly always be found that the services of the surgeon in the case have never been rewarded to the extent of a farthing. It were needless to remark that the interests of professional honor, of charity or humanity must suffer by such conduct.

With dramatic parade the stiffened joint, or crooked or shortened limb is paraded before judge and jury, the large and poor family are on hand and in their proper places. As the patient could not pay his doctor, so he could not fee or retain his lawyer. His fee is to be a half, a third, or the whole the doctor is condemned in damages. The great fact which would make the counsel skulk from his brethren and hide from the face of the Court, does not appear of record. The truth, however, is, the patient, the client and the lawyer are partners for plunder, and when the latter, with mimic emotion, pictures to the jury the deformities and disabilities of his partner, with a lachrymal amen from his

\*NOTE.—"The purchase of a law suit," says Chancellor Kent, "by an attorney is champerty in its most odious form, and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character to speculate in law suits."—*Arden vs. Patterson*, 5 Johns. Ch. Reports, 48.

Chief Justice Sharswood in his lecture on legal ethics, speaking on the subject of contingent fees, says: "Let us look at what would be the results of such a practice if it became general. It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim. It places his client and himself in a new and dangerous relation. They are no longer attorney and client, but partners. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. It is an undue encouragement to litigation. Men who would not think of entering on a law suit if they knew that they must compensate their lawyer whether they win or lose, are ready upon such a contingent agreement to try their chances with any kind of a claim. It makes the law more of a lottery than it is."

The late Mr. Price, of the Philadelphia Bar, says in his concluding advice to students, at the close of his essay on limitation and lien: "Permit me to advise and earnestly to admonish you, for the preservation of professional honor and integrity, to avoid the temptation of bargaining for fees or shares of any estate or other claim contingent upon a successful recovery. The practice directly leads to the disturbance of the peace of society and to an infidelity to the professional obligation promised to the court in which is implied an absence of desire or effort of one in the ministry of the Temple of Justice to obtain a success that is not just, as well as lawful."

partner's large family aforesaid, the doctor, aye, the bystander, the fool, can see the disadvantages under which the doctor contends, and the odds against him. I make no apology for putting the case strong, for I do know that, without the possibilities of successful contradiction, I state substantially what is common and true in a large majority of cases. Nor does the alleged wrong stop here. A successful suit for malpractice is like measles—contagious. If the partnership has proved successful, why not extend the profitable business? There are other uncured or partly cured patients, and when the enterprise costs them nothing, with a possibility of gaining something, it seems as fair to go for the doctor's money as to stock the cards at draw poker. The main question may now be asked—Is there any remedy for this state of affairs, and if so, what can it be? Men in all the learned professions have much to contend against—not the least of which is the general ignorance concerning the nature of the professions. That, of course, admits of no sudden remedy. The *law*, however, all may read, and, although the presumption is a violent one, all are supposed not only to know, but to understand. In theology each man's faith is a law to himself, and, whether right or wrong, admits of no remedy by demonstration or appeal, and what, in the past, has been the general mystery of medicine, will so continue for the present. Among members of the bar, societies are formed for the benefit and protection of its members, regulating their conduct as between themselves, and their professional relations to their clients, and society as a whole. Medical men also associate themselves in societies for similar purposes, prescribing terms of study, and a general standard of qualification and rules of professional ethics. Why would it not be well, then, for the two professions to adopt rules of reciprocity for their mutual benefit? The higher developments of modern society are rendering it almost absolutely necessary that the professions shall know more of each other's duties and responsibilities. The discoveries in the arts and sciences bring not only the possibility, but the fact of new crimes, with new modes of perpetration as well as concealment. The enormous increase and variety of mental diseases, problems of life insurance, quarantine and many other matters that might be mentioned, add each day new problems in legal medicine or medical jurisprudence. In all these branches the two professions are equally interested and should be equally educated. How much soever in times that are past the lawyer might deride or despise the profession of medicine, or the doctor attempt to ignore or berate or belittle the profession of the law, the time has come when, in either case, it is no longer proper, expedient or possible. Medical men who are determined to fill the bill of professional qualification, utility and standing, must make themselves acquainted with the law, with the regulations of legal proceedings, the law and rules of evidence recognized in legal practice. The lawyer or judge who attempts to run the gauntlet of his professional duties in profound ignorance of anatomy, physiology, pathology, chemistry, *materia medica* and therapeutics, and the general rules of medical and surgical practice, will not only disgrace himself, but his profession. In the city of New York the formation of a Medico-Legal Society is doing

much for the mutual benefit of the professions. The works on medical jurisprudence, the least studied and the least understood of all the works in the professional library, are entirely inadequate to meet the requirement. It is true they contain many facts, much that is useful, but are and should be written upon the supposition that the reader is already well acquainted with the elements of both professions. In the absence of such elementary knowledge it is like reading Humboldt's *Cosmos* in ignorance of geology, geography, chemistry, astronomy or history.

The evils of malpractice interest equally the two professions. Medical men, or medical pretenders and impostors, will furnish the cases, but you legal gentlemen must treat them. To do this wisely, you must understand them, if the doctors do not. To do this, and do justice, and not injustice, is your prerogative and with you rests the responsibility. Malpractice is but the counterpart of correct, established and approved practice, and he who would enlighten a jury in regard of the former must necessarily know of what the latter consists.

To reiterate complaints, to point out evils and errors, is a useless task unless some remedy for the same can be suggested. If we would not see the noble professions of the law and medicine degenerate to mere trades, and practitioners become at most cunning knaves, there must exist somewhere among the respective practitioners a lively sense of the honor and dignity, the importance and utility of the two professions without which society would disintegrate and moral, mental and physical ruin follow as first fruits.

As already suggested, medico-legal societies can accomplish much; but that is rather for those who are already in the professions and who probably never contemplate, and never will study, the institutes of an additional profession. The developments of modern society are making day by day new demands upon both law and medicine. The studies required one hundred or fifty years ago as prerequisite qualification to successful practice are vastly inadequate for the present demand. The better colleges of medicine are recognizing the changed circumstances, and are adding another year to the student's term of study.

In looking over the accumulated legal literature of the past fifty years, and the vast range of new matter and subject for legislation, to be viewed and reviewed by judicial adjudication, can any lawyer doubt the propriety or question the necessity of also extending the term of legal studies? The "Cheap John article" will never enter either profession at the close of four or five years of faithful study.

I venture to suggest that the medical doctor will not be the less a doctor, when he enters upon the practice of his profession, to be well acquainted with the elements of the law, the rules and law of evidence, with all the departments of legal medicine, and at least a general knowledge of the proceedings of courts in the administration of justice. Nor is it possible to conceive how a lawyer can be less a lawyer who begins the practice of his profession with a thorough knowledge of human anatomy, physiology, chemistry, therapeutics, and at least a general knowledge of the rules governing medical, surgical and obstetrical practice, the various phases of mental disease, and medical jurisprudence.



